OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 12-05 **May 2, 2012**

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section

In late February, I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA Labor and Employment Law Section together with several senior Agency managers. As in years past, the primary purpose of this meeting was to respond to and discuss Committee concerns and questions about Agency casehandling processes. As is the practice, I provided responses to questions that the Committee had submitted earlier in the year, collected from practitioners from across the country who appear before the Agency. As prior General Counsels have done, I am sharing the P & P Committee members' concerns and my responses with you so that you can have the benefit of this important exchange. Questions directed to the Board have been deleted. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed to me and my responses. The statistics and responses included are current as of the time of the meeting, unless otherwise noted.

During my tenure as Acting General Counsel, it is my intention to conduct the business of the Office of the General Counsel in an open and transparent manner. Continuing a constructive, cooperative relationship with the organized Bar is an important element of this objective and one to which I am committed. At the Midwinter meeting, members of the Committee stated their appreciation to me of the open and constructive relationships enjoyed by members of many local P&P groups with individual Regional Directors. I encourage you to create those liaisons where they do not exist and to continue and broaden those relationships where they do. Constructive relations with representatives of both management and labor who appear before us will only improve the performance of our mission and provide better service to all Agency stakeholders.

/s/
L. S.

Attachment
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cc: NLRBU
NLRBPA

ABA – Questions and Answers

I. UNFAIR LABOR PRACTICE ISSUES

A. First Contract Bargaining Initiative

In GC Memorandum 11-06 (issued February 18, 2011), the Acting General Counsel has continued former General Counsel Meisburg's emphasis on remedial initiatives in first contract bargaining cases including, for example, notice reading, bargaining schedules, and payment of bargaining or litigation expenses.

1. Can you provide the Committee with an update on the status of this initiative and any statistics complied by the Agency that could be shared with us?

The Acting General Counsel remains committed to securing meaningful remedies in first contract bargaining cases. Consistent with the guidance set out in GC 11-06, Regions submit all cases involving first contract issues to the Injunction Litigation Branch of Advice (ILB). In FY 2011, the Regions submitted 37 first contract cases to the ILB (requests for permission to initiate 10(j) proceedings, and recommendations against 10(j) relief). The Board authorized 10(j) action in four cases.[1] One case settled before the Motion for Injunctive Relief was filed. Two were resolved after filing, but before the court ruled. Injunctive relief was granted in the remaining case. See *Calatrello v. General Die Casters, Inc.*, 190 LRRM 2157, 2163-64, 2011 WL 446685, at *8 (N.D. Ohio 2011).

2. What standards or criteria exist for determining whether additional remedies will be sought?

The standards and criteria for determining when the Acting General Counsel will seek additional remedies in first contract bargaining cases are discussed in GC Memorandum 11-06, at pages 2-7.

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[1] 8/12/2011 Hyundai Rotem USA Corp. & TTA Philadelphia LLC, joint employers, Cases 4-CA-37764, et al. Bad-faith bargaining during first contract negotiations - Settled without 10(j) filed.

6/9/2011 Beacon Sales Acquisition, Inc. d/b/a Quality Roofing Supply Company, Cases 4-CA-36852, et al. Undermining union during first contract negotiations/unilateral changes. Settled after 10(j) filed, before Order.

3/28/2011 Tricont Trucking Company, Inc., Cases 4-CA-37628, et al. Undermining newly certified Union during first contract negotiations. 10(j) petition dismissed pursuant to Petitioner's motion after Board adopted the ALJD.

10/29/2010 General Die Casters, Inc., Cases 8-CA-38916 Undermining incumbent union during first contract negotiations. 10(j) granted 1/11/2011.

3. At what stage will respondents be provided with notice of the Acting General Counsel's request for additional remedies?

Regions are encouraged to discuss potential remedies throughout the investigative process. The need for special remedies will also be raised by the Region at the time a merit decision is made, but prior to the issuance of the complaint. Pursuant to Sections 10266 and 10407 of the Case Handling Manual, in order to provide respondent with adequate notice, the complaint should set forth any special remedies sought. The complaint will also specifically reserve the General Counsel's right to subsequently seek any other appropriate remedies as may be appropriate.

4. Have the additional remedies received support from the Board and the courts?

Reading remedies have recently been granted by several district courts in Section 10(j) cases. See *Garcia v. Sacramento Coca-Cola Bottling Co., Inc.*, 733 F. Supp.2d 1201, 1218 (E.D. Cal. 2010) (affirmative provision (c)); *Norelli v. HTH Corp.*, 699 F. Supp.2d 1176, 1206-07 (D. Haw. 2010) (ordering notice reading as part of 10(j) relief in case where employer withdrew recognition from incumbent union), affirmed sub.nom. *Frankl v. HTH Corp.*, 650 F.3d 1334 (9th Cir. 2011); *Calatrello v. General Die Casters, Inc.*, 190 LRRM 2157, 2163-64, 2011 WL 446685, at *8 (N.D. Ohio 2011). The notice-reading remedy was also ordered by the Board in *Vincent/Metro Trucking, LLC and United Food and Commercial Workers Local 789*, 355 NLRB #170 (May 31, 2011). The requirement of scheduled bargaining and periodic reporting as a remedy for the failure to bargain in good faith for a first contract has been ordered by the Board in *Gimrock Construction Inc.*, 356 NLRB No. 83 (January 28, 2011).

B. <u>Deferral</u>

In GC Memorandum 11-05 (issued January 20, 2011), the Acting General Counsel announced new guidelines for investigation of charges alleging violations of Section 8(a)(1) and (3) that were subject to deferral under *Collyer.* This memo followed upon an earlier 2009 memo by former General Counsel Meisburg which called for a "new approach" in treating deferred cases. Our Committee members would like to know the following:

1. What has been the impact of these guidelines on the investigation of deferred cases?

The processes for investigating and pre-deferral processing of cases are set forth in GC 11-05 in Section V. (pp 9-10). Pre-deferral case processing is also modified by the Acting General Counsel's recently issued *Guideline Memorandum Concerning Collyer Deferral Where Grievance-Resolution Process is Subject to Serious Delay*, GC 12-01 (January 20, 2012). The new guidelines require a fuller investigation of the case at the outset so that evidence can be preserved in the event of a complaint issuance and the decision as to whether there is arguable merit is more fully supported.

2. What statistics can you share with us showing the handling and resolution of deferred cases? In particular, we would be interested in knowing the number of cases deferred under GC Memorandum 11-05 and the number of cases that have been dismissed based on the initial investigation.

The Agency is not specifically tracking deferred cases that are impacted by GC 11-05. A query of the data indicates that there are currently 1942 cases pending in deferral. At this time we cannot parse out when these cases were deferred.

3. Has the Agency undertaken or is it contemplating undertaking any outreach efforts action to arbitrators concerning GC Memorandum 11-05?

The Agency has not engaged in any outreach directed specifically towards arbitrators. Any organization may submit a request for outreach on this topic by contacting the Agency's Office of Public Affairs at 202-273-1991 or publicinfo@nlrb.gov or going to the website to request a speaker. Of course, they can call any of us directly as well.

4. What standard is applied in determining whether the parties have sufficiently identified the statutory issue to be presented to the arbitrator?

The standards for deferral to an arbitration award are set forth in Section IV of GC 11-05 (pp 4 – 9).

5. Has the Acting General Counsel or the Board adopted any criteria for determining whether or not an arbitrator has sufficiently determined the statutory issue or issues?

The Acting General Counsel has adopted no formal criteria other than that set out in GC 11-05. There are several Advice memoranda that have been released to the public, e.g., *USPS*, 6-CA-36441 (June 2, 2011) and *Douglas Elliman*, 2-CA-39178 (May 25, 2011), where the Division of Advice has determined that the arbitrator adequately considered the statutory issue.

6. Have there been any cases in which a complaint has been issued because the arbitrator did not adequately address the statutory issue? Are any of those cases currently before the Board?

There have been several cases where complaint has issued because the arbitrator did not adequately address the statutory issues: *IAP*, 31-CA-29505, *Leon Plastics*, 7-CA-52817, and *Babcock & Wilcox*, 28-CA-22625. On July 19, 2011, the Administrative Law Judge recommended dismissal of the complaint in *IAP*. The case was decided by the Board on February 24, 2012 adopting the ALJ's recommendation.

In IAP the Acting GC concluded that the CP was discharged because of his protected concerted activity of repeatedly asking about the status of a retroactive pay increase owed to employees under the collective-bargaining agreement. The Employer asserted that he was discharged for disruptive, argumentative behavior at a meeting where he had raised this issue (and for other reasons unrelated to that behavior). The arbitrator upheld the discharge, finding that CP was disruptive and argumentative and should have raised the issue with management in private. We concluded that the conduct did not lose protection under *Atlantic Steel*, and that the Employer had not made out a *Wright Line* defense, and therefore that the decision upholding the discharge was repugnant. We argued in the alternative that the deferral standard should change and that, under the new standard, deferral was inappropriate because the arbitrator did not correctly enunciate and apply the statutory principles (*Atlantic Steel* and *Wright Line*).

The Board dismissed the case with a short form adoption of the ALJ's decision. However, the Board noted in a footnote that because the Acting GC's proposed new framework would not lead to a different result, it declined to consider the Acting GC's request at this time. (358 NLRB No. 10)

7. Have the new guidelines affected the Board's reviews of deferred cases under *Spielberg/Olin standards?*

There have been no Board decisions addressing the proposed new standard.

8. Have there been any positive or negative reactions from arbitrators?

The Acting General Counsel is not aware of any specific reactions to GC 11-05 from any arbitrators.

C. <u>Section 10(j) Injunctions</u>

In GC Memorandum 10-07 (issued September 30, 2010), the Acting General Counsel outlined an "optimal timeline" for so-called "nip-in-the-bud" discharge cases in which the Regional Director would optimally make a merit determination within 49 days of the filing of a charge. A subsequent Memorandum OM 11-11 instructed the Regions to keep separate monthly records as to "10(j) discharges in Organizing Campaigns."

1. The Committee is interested in an updated report on the number of 10(j) injunctions issued in organizing campaigns? What statistics can you share with us?

- During FY 2011, Regions identified **463** cases involving discharges during an organizing campaign. This represents approximately **2.1%** of total intake (**22,188** unfair labor practice charges) during FY 2011.

- For investigations completed during the first year of the initiative, Regions found there was reasonable cause to believe that **362** employees in **128** cases were discharged during an organizing campaign in violation of Section 8(a)(3) of the Act. The total number of employees alleged in charges to have been discharged during an organizing campaign in violation of Section 8(a)(3) was **1224**.

- During the first year of the initiative, **384** cases were decided by Regional Directors. Of these **384** cases, **267** cases were found to have no merit and **128** cases were found to have merit to the discharge allegation.

- During the first year of the initiative, Regions sent **39** memoranda to ILB seeking 10(j) authorization with respect to discharges occurring during an organizing campaign.

- During the first year of the initiative, Regions have obtained settlements in **76** cases in an average of **102** days from the filing of the charge. During the first

year of the initiative, for 5 cases litigated to completion in district court, remedial relief was obtained in an average of **298** days from the filing of the charge.

- As to these **5** Section 10(j) cases, **14** discriminatees were ordered reinstated to their former or substantially equivalent positions by the district courts.

- For all cases settled since the beginning of this initiative in FY 2011, **272** discharged employees were offered reinstatement, of whom **129** accepted the offers of reinstatement and **143** waived reinstatement. In these settlements, Regions collected a total of **$1,319,637.82** in backpay and interest. The monies collected generally represent 95% of the total amount owed to the discriminatees in backpay and interest.

- During FY 2011, with respect to district court litigation, for the 16 completed Board-authorized cases involving Section 10(j) discharge during an organizing campaign, Regions won in full or in part **5** cases, lost no cases, and obtained settlements and adjustments in **11** cases, resulting in a **100%** success rate.

- Since the start of this initiative, the time for processing a Region's request for Section 10(j) authorization by Headquarters has been significantly reduced for cases involving discharges during an organizing campaign. Specifically, the Acting General Counsel's Office passed on such requests for 10(j) authorization in an average of **7 days** from receipt of the Region's memorandum and the Board decided whether to authorize 10(j) relief in an average of **6 days** from receipt of the memorandum seeking such authorization.

2. Have been [sic] any changes in the casehandling manual as a result of the Agency's experiences in these cases? Are there any plans to update the 10(j) manual?

The CHM has been updated to reflect the policies set forth in GC 10-07. The current Unfair Labor Practice Casehandling Manual, Section 10052.9 provides as follows:

> **10052.9 Injunctive Relief under Section 10(j)**
>
> (a) *10(j) Relief Generally:* As part of the initial review of a case, the Board agent should be alert to the possible appropriateness of injunctive relief under Section 10(j) of the Act. Such relief may be requested by the charging party or considered by the Regional Office on its own initiative. Sec. 10310. If the nature of the allegations in the charge suggests the possible need for 10(j) relief, the charge must be classified as a category III case under Impact Analysis and given the highest priority. Sec. 11740. In such circumstances, the Board agent, when initially meeting with the charging party's witnesses, generally must obtain evidence as to whether injunctive relief is "just and proper." If charging party's evidence points to a prima facie case on the merits, and suggests the need for injunctive relief, the Region

should notify the charged party in writing that the need for 10(j) relief is being seriously considered and request its position on that issue.

(b) 10(j) Relief in Nip-in-the-Bud Discharge Cases: In addition to the guidance set forth in (a) above, where the case involves a nip-in-the-bud discharge, the expedited procedures for the investigation and subsequent processing as set forth in GC Memo 10-07 should be carefully followed, including:

- Taking the lead affidavit within 7 calendar days from the filing of the charge, where possible.
- Obtaining all of the charging party's evidence within 14 days from the filing of the charge, where possible.
- Requesting that the charged party's position on the need for 10(j) relief be submitted to the Regional Office within 7 days after the written notification. Such notification can be combined with the letter putting the charged party on notice of the allegations, and should generally be sent within 21 days from the filing of the charge.

In view of GC Memo 11-01, the casehandling manual is being revised, and the revised manual will hopefully be available shortly, to state in a new section, 10266.8, the following:

10266.8 Effective Remedies in Organizing Campaigns

Certain violations during an organizing campaign, in addition to unlawful discharges, have a particularly lasting and significant impact on employees' Section 7 rights. In order to permit employees to fully exercise their statutory right to free choice, in addition to seeking 10(j) reinstatement for any such discharges during an organizing campaign, Regional Offices should consider whether to seek the following remedies.

(a) *Notice Reading*: In all nip-in-the-bud discharge cases, Regions should seek a notice-reading remedy and consider seeking such a remedy, even absent such discharges, when there are serious 8(a)(1) violations. Notice reading remedies generally require that a responsible management official read the notice to assembled employees, or that a Board agent read the Notice in the presence of a responsible management official.

(b) *Access Remedies*: Access remedies may be appropriate when there is an adverse impact on employee/union communication, and may include providing the union:

- Access to bulletin boards
- An updated list of current employees' names and addresses.

> In addition, if the Region concludes that the above remedies are insufficient to permit a fair election or have a severe impact on employees, it should submit a recommendation to the Division of Advice regarding which additional remedies are warranted. See GC Memo 11-01.

With respect to the 10(j) manual, we hope to issue an update in the near future, resources permitting.

I.C.3 Are the timelines in GC Memorandum 10-07 being met?

We are very pleased with the timely processing of these cases. Frankly, we now believe that some of those numbers were a bit ambitious and we are reviewing them. Having said that, the Regions have obtained settlements in 76 cases in an average of 102 days from the filing of the charge. Achieving resolution in an average of just over 3 months is quite an accomplishment. Those cases that were fully litigated, of course took longer averaging a little over 9 months to resolution, which we also consider a successful accomplishment. Lastly, we are happy to report that the time these requests remain in headquarters pending determination has been significantly reduced.

B. Investigative Subpoenas

1. What statistics can you share with us concerning the use of subpoenas in C-case investigations?

To summarize the overall numbers, during fiscal year 2011, the Regions utilized 1,412 investigative subpoenas, divided between 891 subpoenas ad testificandum and 521 subpoenas duces tecum. Regions issued investigative subpoenas in 692 cases. That total constitutes approximately 3.0% of the 22,177 charges filed during fiscal year 2011. In fiscal year 2010, the Regions issued a total of 1,448 investigative subpoenas in 659 cases. For 2010, investigative subpoenas issued in 2.8% of the cases filed. Comparing fiscal year 2011 with fiscal year 2010, slightly fewer investigative subpoenas were issued in fiscal year 2011, however, during that year, investigative subpoenas were issued in a slightly higher percentage of cases.

With regard to the determinations reached in cases in which investigative subpoenas were issued during fiscal year 2011, in 49% of the cases Regions reached a determination that a case had merit, either in full or in part, in 39% of the cases Regions reached a determination that a case lacked merit, and in 12% of the cases Regions either had yet to reach a determination or reached a resolution that did not require a merit determination.

During fiscal year 2011, Regions filed 19 actions in federal court seeking enforcement of investigative subpoenas. Decisions enforcing the subpoenas issued in six cases and two cases remain pending before the courts; resolutions of the other 11 enforcement actions were achieved without the necessity of a court decision.

Region **FY 2011**	No. of Cases	Ad Test	Duces Tecum	Total	Merit	Nomerit	Other (Not decided/ Deferred)	Ptn	Enf Act
1	16	5	11	16	9	3	4		
2	67	70	53	123	32	29	6		
3	10	26	8	34	6	3	1		1
4	17	22	12	34	12	5	0		
5	16	29	3	32	9	6	1		
6	25	40	20	60	10	14	1		1
7	30	49	16	65	16	14	0		1
8	15	15	16	31	10	3	2		
9	20	34	8	42	16	2	2		1
10	11	15	10	25	7	3	1		
11	17	18	6	24	10	4	3		
12	38	42	30	72	13	20	5		2
13	15	21	10	31	9	5	1		1
14 & 33	26	44	30	74	8	10	8		2
15	49	61	46	107	25	21	3		2
16	36	55	19	74	15	18	3		2
17	7	8	4	12	1	5	1		
18	19	31	8	39	10	8	1		
19 & 36	20	20	14	34	7	9	4		

20 &37	20	14	15	29	14	5	1		
21	27	31	47	78	14	9	4		*
22	28	14	28	42	8	9	11		3
24	11	6	11	17	8	3	0		2
25	12	17	4	21	6	5	1		1
26	3	2	3	5	1	2	0		
27	10	14	1	15	4	6	0		
28	12	14	9	23	11	1	0		
29	20	13	15	28	8	9	3		
30	34	71	22	93	21	10	3		
31	9	8	4	12	4	5	0		
32	47	81	34	115	16	19	12		
34	5	1	4	5	1	3	1		
Totals	692	891	521	1412	341 49% 56%	268 39% 44%	83 12%		19

C. Access Cases

In view of the recent Board decisions in the *Venetian and New York New York* [2] case concerning access of employees and union organizers to the property of the employer, the Committee is interested in the following:

1. **Have there been any changes in the manner in which the Regions investigate these particular cases?**

No.

2. **Is the Acting General Counsel contemplating any initiatives in this area? Are there any cases pending in the Division of Advice that address novel claims involving access?**

The Acting General Counsel is not contemplating any initiatives in this area. There is at present one case pending in the Division of Advice that involves novel claims regarding access. The issue in that case is whether employees of a parent corporation should be considered off-site employees of the subsidiary, such that they are entitled to access to the outside of the subsidiary's facility to engage in organizing activities

3. **Are there cases pending in the Division of Advice that address novel issues under *Register Guard?***

In GC 11-11 (Mandatory Submissions to Advice), the Regions were instructed to send in all cases raising issues under *Register-Guard* with an eye toward developing a litigation strategy to challenge that decision. There are several cases pending in the Division of Advice that address issues under *Register-Guard,* including whether an employer's computer/email usage policies unlawfully restricted use of email along Section 7 lines, whether an employer disabled certain capabilities of its email system in order to interfere with Section 7 activities, and whether an employer discriminatorily enforced a facially lawful policy.

[2] The DC Circuit Court of Appeals recently enforced the Board's decision. See *New York New York, LLC v. NLRB*, 11-1098 (DC Circuit April 17, 2012).

D. Default Language

In GC Memorandum 11-04 (issued January 12, 2011), the Acting General Counsel gave guidance that certain default language should be incorporated in informal settlement agreements.

1. What has been the impact, if any of this instruction on the Agency's ability to secure satisfactory settlements?

The General Counsel implemented the program in January 2011, more than three months after the start of the fiscal year. The Agency reported a settlement rate of 93.2% for the fiscal year ending September 30, 2011. The settlement rate for the prior year, the fiscal year ending September 30, 2010 was 95.8%. The settlement agreement rate for the last ten years has ranged from 91.5% to 99%.

For the three month period from October 1, 2010 through December, 31, 2010, prior to the implementation of the memo, the Agency settled or adjusted 1650 cases. For the same period in 2011, the Agency settled or adjusted 1709 cases, 59 more cases than the same the three month period in 2010.

Anecdotally, we have no information to suggest that the use of default clauses has adversely affected the Agency's ability to secure satisfactory settlements.

2. Since this memo issued, what statistics can you share with us showing the number of cases settled with and without the default language?

The General Counsel's Memorandum instructed the Regions to routinely include default language in all informal settlement agreements and all compliance settlement agreements, or in the alternative, in appropriate situations, to utilize confessions of judgment. Because the program applies to all cases where there is a regional determination of merit, the Agency has not collected statistics showing the number of cases settled without default language.

3. What discretion, if any do the Regions have to modify or decline to include the default language in the settlement agreement?

In GC 11-04, the Acting GC instructed the Regions to "routinely include default language in all informal settlement agreements and all compliance settlement agreements". The Acting General Counsel subsequently issued GC 11-10 *Clarification of GC 11-04* modifying the default language in light of questions about the meaning of the term "ex parte" and providing that the motion is actually for a default judgment rather than a summary judgment. In addition, GC 11-10 announced that if there is a substantial basis to vary from this policy, a Regional Director should consult with his or her Assistant General Counsel or Deputy in the Division of Operations-Management to seek clearance to do so.

The Acting General Counsel's clear preference is to include default language in all informal settlements. However, on a case-by-case basis, Directors have been given discretion to enter into agreements that contain a temporal limit on enforcing the default language for a defined period (of not less than 6 months) if the Region is confident that the chances of default are low. In addition, in settlements involving multi-site employers, Directors have been given

the discretion to limit the provisions of the default language to a particular location, where the recent ULP activity occurred.

4. Are there cases in which an Administrative Law Judge has taken a settlement without the default language over the General Counsel's objection? If so, how many?

A survey of Regional Offices reveals that there was only one occasion where an ALJ took a settlement without default language over the Acting General Counsel's objection: *Lee Enterprises, Inc. d/b/a Arizona Daily Star*, Case 28-CA-23267, ALJ Biblowitz, approved Respondent's version of a Board informal Settlement Agreement with which the Charging Party had agreed. Counsel for the Acting General Counsel objected to its approval on several bases, including that Respondent had eliminated the default provision and altered the standard Board Notice language for the violations. Counsel for the Acting General Counsel took a special appeal to the Board. On November 18, 2011, the Board denied the special appeal on the merits but did not specifically address the default language issue.

In another case, *Bakery, Confectionery, Tobacco Workers and Grain Millers Local 65*, Case 17-CB-6633 – the ALJ took a settlement without default language. The Region did not appeal the ALJ's action because the Union had no history of proscribed behavior and did not anticipate the union would renege on the settlement.

5. Are there any contested cases in which the Region claims that the default language has been breached? If so what can you tell us about the circumstances of those cases?

Yes the following cases are responsive to your inquiry:

Vocell Bus, Case 1-CA-45915, was litigated before the Board and the case was remanded as the Board found that there was a factual issue regarding whether there was a breach of the settlement agreement.

Rogan Bros., Case 2-CA-40028, where Counsel for the Acting General Counsel moved for Summary Judgment after the settlement with default language was breached. The Board issued an Order granting the motion. The Agency has initiated enforcement proceedings in the 2nd Circuit.

Premier Investigative Services, Case 5-CA-35865, 357 NLRB #113 (2011) where a default settlement was approved prior to the issuance of GC Memorandum 11-04 settling the allegation that it had failed to provide employees with their retroactive wage increase. The Board granted the Region's Motion for Summary Judgment on November 18, 2011. The case is currently pending Enforcement because Respondent has refused to comply with the Board Order.

Stagetech Productions, LLC, Cases 11-CA-22813 and 11-CA-23147, the settled allegations in Case 11-CA-22813 included a number of independent Section 8(a)(1) violations and 8(a)(3) refusal to hire allegations. In a subsequent charge, Case 11-CA-23147, the Region found merit to allegations that the Respondent again unlawfully refused to hire the discriminatees and devised a discriminatory referral list. Complaint has issued on the consolidated cases, alleging breach of the prior agreement, and the parties are discussing settlement. The current hearing date is March 19.

Casino One Corporation d/b/a Lumiere Place Casino & Hotels, Case 14-CA-30212, the Region approved an informal settlement agreement with default language on April 28, 2011. The default language contained in the agreement pre-dated GC 11-04 and 11-10, and the settlement resolved allegations relating to refusals and delays in furnishing information and unilateral changes. In Case 14-CA-66026 against the same employer, the Region issued a complaint on January 31, 2012 alleging numerous 8(a)(5) allegations relating to delays and refusals to furnish information and unilateral changes. The Region has sent the letter giving the Employer 14 day notice of noncompliance as required by the default language contained in the agreement in Case 14-CA-30212.

Veolia Transportation Services (Phoenix Division), Cases 28-CA-68619 and 28-CA-71493, where the Director recently issued a consolidated complaint which is premised on bad faith bargaining occurring after an earlier bad faith bargaining case settlement. The Region intends to seek default judgment on the earlier case.

47 Old Country, Inc. d/b/a Babi I; Jilly SN Inc. Babi Nail USA II Corp. d/b/a Babi II, Case 29-CA-30247, where the Director approved a settlement resolving 8(a)(1) reduction in work hours and the discharge of four employees, disciplinary warnings, threats and impression of surveillance. The circumstances of the breach involve the Employer's failure to reinstate one of the four discriminatees. Consistent with the procedures set forth in GC 11-04, on January 20, 2012, the Director issued an order revoking the settlement and re-issuing the complaint.

E. <u>Social Media</u>

OM Memoradum 12-17 provides for tracking of social media cases, among other "hot topics." The Committee would be interested in an update on social media cases that have been submitted to the Division of Advice or are pending before the Board. In addition, the members would like to know:

I.E.1 Has the Agency adopted any policies and practices to coordinate the filing of charges and the production of evidence in cases involving multiple Regions?

For example, are Regions aware that similar charges involving the same policy may be pending in other Regions?

We are not coordinating the social media cases regionally; however, where the Region is considering issuance of a complaint, the Regions have been instructed to submit the case to the Division of Advice.[3]

As to the more generic question, the Division of Operations-Management monitors and coordinates the investigation of similar charges filed in multiple Regions involving the same parties. This coordination includes identifying which similar charges are appropriate for coordination, informing all Regions as to where similar charges involving the same parties are

[3] Initially, Regions had been instructed to submit all social media issues to Advice. This is no longer required in light of the guidance that is now available on this subject.

pending and contemporaneously issuing guidance to all Regions regarding the further processing of these charges. Generally, these case situations are coordinated under one Regional Director who is responsible for overseeing all determination documents before they are sent to the parties and thereby ensuring that all of these charge allegations are decided in a consistent manner. If necessary, the responsible Director will consolidate all meritorious charges in the coordinated case for litigation.

All Regions are notified when similar charges involving the same policies are pending in multiple offices. The Office of the General Counsel may highlight these cases for field and HQ offices through the Agency's NxGen Case Management System's *Hot Topics and Issues*. Further, the Division of Advice may issue guidance as to the processing of pending allegations which address a policy being considered by the General Counsel.

I.E.2 Have any particular problems arisen with respect to coordination amongst the Regions in these cases?

No particular problems have arisen in the Regions' coordination of these cases.

I.E.3 How many social media cases are pending in the Division of Advice? How are these cases being categorized?

As of late February, there were 12 social media cases pending in the Division of Advice. There has been no special categorization of these cases. Under the Agency's impact analysis categorization, most of these cases are Category 3 cases because they involve discharges.

II. REPRESENTATION CASES

In anticipation of the April 30, 2012 effective date of the final rule on representation case procedures, the Committee is interested in the following issues:

A. New Representation Case Procedures

1. What guidance will be provided to the Regions concerning the implementation of the final rule, including on the following issues:

a. Any changes in time targets for elections;

b. The hearing officer's authority to exclude evidence or limit the issues to be litigated at the hearing;

c. The extent to which hearing officers will have authority to exclude evidence on unit determination issues under the *Specialty Healthcare* standard;

d. The hearing officer's authority to grant or deny permission to file post-hearing briefs;

e. The standard for seeking special permission to appeal to the Board; and

f. Conducting elections where alleged supervisors vote subject to challenge.

Answer: We have issued a guidance memorandum that addresses implementation of the new representation case rules. See GC Memo 12-04.

2. Are there any plans to revise the Hearing Officer's Manual?

Answer: We plan to revise the Hearing Officer's Manual, but that will not be completed before April 30. Board Agents are being trained in their offices by trainers from their Region who recently attended a "train the trainer" conference in Headquarters in April.

3. What statistics will be tracked concerning the implementation of the procedures set forth in the final rule?

Answer: We expect to continue our longstanding practice of gathering data about the processing of representation cases. We do not currently plan to gather any new statistics as a result of implementing the new procedures.

II. B Specialty Healthcare

In how many cases has the *Specialty Healthcare* standard been applied to unit determinations in the non-acute healthcare industry or other industries? What was the outcome in those cases?

As of February 8, 2012, the Board has issued three decisions applying *Specialty Healthcare*. In addition, the Board has several unpublished Orders in which that standard was applied and/or discussed, or in which the underlying Regional Director's Decision discussed the standard. Similarly, Regional Directors have issued three decisions applying *Specialty Healthcare* in which no party sought review. They are discussed in more detail below.

Published Board Decisions

ODWALLA, INC., 357 NLRB No. 132, Case 32-RC-5821 (December 9, 2011)

Issue: Whether a unit that excluded merchandisers is appropriate.

Outcome: Decision and Direction (Chairman Pearce and Member Becker, Member Hayes concurring) finding that a unit excluding merchandisers was not appropriate.

The case arose in a somewhat different posture from the usual unit determination cases. Here, the parties stipulated to an election in a unit that included "[a]all full-time and regular part-time route sales drivers, relief drivers, warehouse associates, and cooler technicians." However, the parties could not agree on whether merchandisers should be included--the Union arguing that they should be excluded and the Employer that they should be included—and thus the parties stipulated that the merchandiser employees could vote subject to challenge

Three ballots were challenged, but the only issue before the Board concerned the challenge to a merchandiser, as permitted by the stipulation. The hearing officer had sustained the challenge to the merchandiser's ballot, finding that the merchandisers, as a group, lacked a sufficient community of interest with the unit employees.

Applying *Specialty Healthcare*, the Board (Chairman Pearce and Member Becker) concluded that merchandisers shared an overwhelming community of interest with the employees the parties agreed should be in the unit, and therefore a unit excluding the merchandisers was not an appropriate unit.

The Board assumed that the employees in the various classifications in the unit recommended by the hearing officer were readily identifiable as a group and shared a community of interest. The Board then determined that the Employer had carried its burden of proving that the merchandisers shared an overwhelming community of interest with the included employees, *i.e.*, that a unit excluding merchandisers was a "fractured unit."

In finding that there was "no rational basis for excluding the merchandisers while including all the other classifications in the unit," the Board concluded that none of the traditional community-of-interest factors suggests that all the employees in the recommended unit shared a community of interest that the merchandisers did not equally share. Thus, the Board noted that the hearing officer's recommended unit did not track any lines drawn by the Employer, such as classification, department, or function, and it was not a classification-based unit because it

aggregated varied classifications: That unit also was not structured along lines of supervision, nor was it drawn in accordance with methods of compensation

Member Hayes concurred in the result. He agreed that the recommended unit constituted a "fractured unit" and was therefore inappropriate as a matter of law. He adhered to his dissenting position in *Specialty Healthcare*, and thus did "not regard the mere fact that a petitioned-for unit tracks lines of job classification, department, or function as dispositive of the appropriate unit analysis." Member Hayes relied on cases holding that a petitioner cannot seek to represent "an arbitrary segment" of an otherwise appropriate unit, *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999), and that "the Board does not approve fractured units, *i.e.*, "combinations of employees that are too narrow in scope or that have no rational basis." *Seaboard Marine*, 327 NLRB 556, 556 (1999). Under that precedent, Member Hayes agreed that the recommended unit excluding merchandisers was arbitrarily constructed and lacked any rational basis.

NORTHROP GRUMMAN SHIPYARD, 357 NLRB No. 163, Case 5-RC-16292 (December 30, 2011)

Issue: Whether a unit of radiological control technicians (RCTs), calibration technicians, laboratory technicians, and RCT trainees was appropriate for bargaining.

Outcome: Decision on Review (Chairman Pearce and Member Becker, Member Hayes, dissenting), affirming the Regional Director's finding.

A Board majority (Chairman Pearce and Member Becker) affirmed the Regional Director's finding that a departmental unit of radiological control technicians (RCTs), calibration technicians, laboratory technicians, and RCT trainees is appropriate for bargaining.

Applying the principles set forth in *Specialty Healthcare*, the Board concluded that the employees were "readily identifiable as a group." The Board further found that the Employer failed to establish that the other technical employees it sought to include in the unit shared an overwhelming community of interest with the radiological employees. Additionally, the Board found, in agreement with the Regional Director that even under the traditional community of interest test, a departmental unit of radiological technical employees constituted "a functionally distinct grouping with a sufficiently distinct community of interest as to warrant a separate unit appropriate for the purposes of collective bargaining."

Member Hayes dissented, finding that the majority's result illustrated "the degree to which *Specialty Healthcare* has elevated the extent of organizing as the definitive factor in determining the appropriateness of units." Member Hayes concluded that the Board's longstanding policy has been that an appropriate unit should include all those who share a community of interest and carry out functionally related duties. Member Hayes found that under the relevant precedent, the departmental unit was not appropriate.

DTG OPERATIONS, INC., 357 NLRB No. 175, Case 27-RC-8629 (December 30, 2011)

Issue: Whether a unit of rental service agents and lead rental service agents at the Employer's airport rental car facility was not an appropriate unit for bargaining.

Outcome: Decision on Review (Chairman Pearce and Member Becker, Member Hayes, dissenting) reversing the Regional Director.

A Board majority (Chairman Pearce and Member Becker) reversed the Regional Director's findings that: (1) the petitioned-for unit of rental service agents (RSAs) and lead rental service agents (LRSAs) at the Employer's Denver International Airport rental car facility was not an appropriate unit for bargaining; and; (2) instead, the smallest appropriate unit was a wall-to-wall unit of all 109 of the Employer's hourly employees (including its return, lot, service, fleet, and exit booth agents, staff assistants, shutters, courtesy bus drivers, mechanics, and building maintenance technician).

Applying the principles set forth in *Specialty Healthcare*, the Board found, contrary to the Regional Director, that: (1) the RSAs and LRSAs shared a community of interest, and (2) the Employer failed to demonstrate that the additional employees it sought to include in the unit shared an overwhelming community of interest with the RSAs and LRSAs. Specifically, the Board found that the petitioned-for RSAs' and LRSAs' primary job functions and duties, skills and qualifications, uniforms, work areas, schedules, incentives, risks, and supervision were different from all other employees. Accordingly, the Board remanded the case to the Regional Director to direct an election in the petitioned-for unit of RSAs and LRSAs.

Member Hayes dissented, finding that the majority's result "provides further confirmation of the predictable effects of their outcome-driven *Specialty Healthcare* test for determining whether a unit is appropriate for bargaining." Member Hayes concluded that under the relevant precedent and his prior dissents to the *Specialty Healthcare* test, the Regional Director's decision should be affirmed and the petition dismissed.

Unpublished Board Orders

EXTENDICARE HOMES, INC. d/b/a TEXAS TERRACE CARE CENTER,
Case 18-RC-70382

Issue: Whether the ARD erred in finding that the petitioned-for nursing assistants and medical aides constitute an appropriate unit without the inclusion of cooks and dietary assistants.

Outcome: Order dated January 25, 2012, denying review. (Chairman Pearce and Member Griffin, Member Hayes concurring).

The Employer operated a nursing home in Minnesota. The Union sought to represent 62 nursing assistants registered (NARs) and nine trained medical aides/assistants (TMAs); the Employer contended that cooks and dietary assistants must also be included in the unit.

Applying the analysis in *Specialty Healthcare*, the Acting Regional Director found the petitioned-for unit appropriate. The Employer filed a request for review asserting that the cooks and dietary assistants share an overwhelming community of interest with the petitioned-for employees and must be included in the unit. The Employer also urged the Board to reconsider its decision in *Specialty Healthcare* and return to the standard set forth in *Park Manor Care Center*, 305 NLRB 872 (1991).

OLIVER C. JOSEPH, INC., Case 14-RC-12830

Issue: Whether the Regional Director correctly found a unit of six journeymen, three service technicians, and four lube and oil employees to be an appropriate unit based on both craft status and traditional community of interests grounds, excluding detail employees.

Outcome: Order dated September 7, 2011 denying review. The Board majority (Chairman Pearce and Member Becker) stated the following:

The Regional Director decided this case before the Board issued its decision in *Specialty Healthcare & Rehabilitation Center of Mobile,* 357 NLRB No. 83 (2011), clarifying the standard used in cases where a party argues that a proposed bargaining unit is inappropriate because it excludes certain classifications of employees. Nevertheless, the Regional Director's analysis is consistent with *Specialty Healthcare* and we would deny review here whether or not *Specialty Healthcare* applies.

Member Hayes concurred in the result, agreeing that the unit was appropriate, but he did not rely on the Regional Director's finding that the detail employees did not share such an overwhelming community of interest with the unit employees so as to compel their inclusion in the unit. Instead, he found that, under the traditional community of interest test, the interests of the unit employees were sufficiently distinct from the detail employees.

PERFORMANCE OF BRENTWOOD LP, Case 26-RC-63405

Issues: 1) Whether the Regional Director erred in applying the single-facility presumption in finding that the petitioned-for car dealership is appropriate where the dealership consists of both a new car facility and a separate pre-owned car facility; and (2) Whether the Regional Director erred in finding that a unit of service technicians, lube technicians, diagnostic technician, and workflow coordinator at the dealership is an appropriate unit, based on both craft status and traditional community of interest grounds, excluding service advisors, get ready technicians and detail technicians.

Outcome: The Board issued an Order, dated November 4, 2011, granting review, but later rescinded the order when the Employer requested withdrawal of the request for review.

FIRST AVIATION SERVICES, INC., Case 22-RC-61300

Issue: Whether the Regional Director properly found the petitioned-for unit of line service technicians and lead line service technicians at an airport facility to be an appropriate unit for bargaining, excluding various other classifications.

Outcome: Order dated October 19, 2011 denying review (Chairman Pearce and Member Becker; Member Hayes dissenting). Applying the standard set forth in *Specialty Healthcare*, the Regional Director found that "the employees in the proposed unit of line service technicians and line service technician leads are readily identifiable as a group and clearly share a community of interest with one another." He further concluded that the additional employees that the Employer sought to include "do not share such an overwhelming community of interest with the line service technicians that their inclusion is required."

GRACE INDUSTRIES LLC, Cases 29-RC-12031 and 29-RC-12043

Issue: Whether a unit of asphalt pavers is appropriate.

Outcome: On December 8, 2011, the Board (Chairman Pearce and Member Becker, Member Hayes concurring) granted review and remanded the case to the Regional Director.

The Regional Director directed an election in an overall unit consisting of pavers "regardless of the material used," *i.e.*, concrete or asphalt. LIUNA Local 1010, with the support of the Employer, contended that only the overall unit was appropriate, whereas Local 175 contended that a unit limited to pavers working with asphalt was also appropriate. The Board majority stated that the Regional Director's decision raised substantial factual issues, and instructed the Regional Director to consider the case in light of *Specialty Healthcare*, which issued subsequent to the Regional Director's Decision.

Member Hayes, concurring, stated that under either the majority or dissenting view in *Specialty Healthcare*, a remand was necessary to explain why the asphalt-only unit sought by Local 175 is not appropriate.

On December 28, 2011, the Regional Director issued his Second Supplemental Decision. In response to the Board's Order, the Regional Director summarized his earlier factual findings and restated that the asphalt-only unit sought by Local 175 was inappropriate. Further, the Regional Director found that *Specialty Healthcare* "applies only to one-union cases where the employer seeks a larger unit," and not to cases, such as this one, where two different unions petition for two different units.

Local 175 has filed a Request for Review, arguing that the Regional Director erred in finding the asphalt-only unit inappropriate and in distinguishing *Specialty Healthcare*. The case is **pending**.

NESTLE DREYER'S ICE CREAM, Case 31-RC-6625

Issue: Whether a unit of maintenance employees excluding production employees is appropriate.

Outcome: Order dated December 28, 2011, denying review (Chairman Pearce and Member Becker, Member Hayes concurring). Utilizing the standard set forth in *Specialty Healthcare*, the Regional Director found that the maintenance employees were readily identifiable as a separate group and shared a community of interest, and that the Employer had not established that they shared an overwhelming community of interest with production employees.

Regional Director's Decisions

PRINT FULFILLMENT SERVICES LLC, Case 9-RC-63284

Issue: Whether a unit of lithographic production employees, including pre-press plate makers, offset press operators, digital press operators, feeders, and press helpers, and excluding all other employees (bindery employees, UV coating employees, maintenance employees, shipping and receiving employees) was appropriate.

Outcome: Decision and Direction of Election dated September 29, 2011 finding lithographic production employee unit appropriate. No request for review filed.

The Regional Director first found that the pressroom employees sought by the Union constitute a craft unit that was appropriate for bargaining. Assuming that these employees did not constitute a craft unit, the Regional Director alternatively found that they possessed "a separate and distinct community of interest from the remainder" of the other employees, and that the Employer "failed to establish that employees in the unit it proposed share an

overwhelming community of interest with those in the petitioned-for unit, so as to render the petitioned-for unit inappropriate," citing, inter alia, *Specialty Healthcare*.

MCCOY LOGISTICS SERVICES JOINT VENTURE, Case 30-RC-62064

Issue: Whether a single-facility unit was appropriate and whether the Employer rebutted the presumption.

Outcome: In his Decision and Direction of Election dated September 9, 2011, the Acting Regional Director found that a single-facility unit was appropriate and that the Employer failed to rebut that presumption. The Acting Regional Director cited *Specialty Healthcare* for the proposition that:

> Because a proposed unit need only be an appropriate unit and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the proposed unit plus others is appropriate, or even that it is more appropriate, is not sufficient to demonstrate that the proposed unit is inappropriate.

MISSION HEALTHCARE #1, LLC, d/b/a EVERGREEN TERRACE, Case 18-RC-68641

Issue: Whether a unit of licensed practical nurses was appropriate and whether to order a self-determination election where the licensed practical nurses vote whether to be represented by the petitioning Union as part of its existing service and maintenance unit.

Outcome: Employer acknowledged that a unit of licensed practical nurses employed at its facility was appropriate, but it argued that the licensed practical nurses did not have a community of interest with an existing unit composed of service and maintenance employees that included trained medical assistants and certified nursing assistants. In a Decision and Direction of Election dated December 2, 2011, the Regional Director found that the licensed practical nurse unit was an appropriate unit. Moreover, he found the Union's request for a self-determination election, where the licensed practical nurses vote on whether to be represented as part of the existing service and maintenance unit, was consistent with Board law. Citing *Specialty Healthcare*, 357 NLRB No. 83 (2011), Slip op at p. 8, the Director concluded that there is not a single set of appropriate units in nursing homes. Rather, "…the Board need find only that the proposed unit is an appropriate unit, and … there may be multiple sets of appropriate units in any workplace."

II.C. Voluntary Recognition Cases (Dana)

How many voluntary recognition bar cases have been decided since *Lamons Gasket.?* What was the "reasonable period of time for bargaining" determined to be in those cases?

The Regions have decided 10 cases involving voluntary recognition bar cases since the issuance of the Board's decision in *Lamons Gasket*. All but one of these decisions involved petitions that had been filed prior to the issuance of *Lamons Gasket*. Consistent with the Board's determination in *Lamons Gasket* to apply the principle adopted in that case retroactively, the Regions determined that all nine of the petitions should be dismissed because they had been filed within the six months of the employer extending recognition to the union. In seven of these cases the Directors issued orders dismissing the petitions. In the other two cases the petitioner withdrew the petition.

In one case filed since *Lamons Gasket*, a Regional Director considered whether the voluntary recognition bar doctrine barred a decertification petition filed approximately 9 months after the employer extended recognition to the union and approximately 8 months after the parties started bargaining. In this case the Regional Director determined that the parties had had a reasonable period of time to bargain and therefore the Director determined that an election should be held. After issuance of the Director's decision, the Union disclaimed interest, and thereafter, the Petitioner withdrew the petition.

There are no *Lamons Gasket* cases currently pending before the Board.

II.D. Successor Bar Cases

How many successor bar cases have been decided since *UGL-UNICCO?* What was the "reasonable period of bargaining" determined to be in those cases?

The Regions have decided 10 cases that in one form or another involved successor bar issues since the issuance of UGL-UNICCO. In most of these cases, the petition, or allegation of unlawful assistance by a successor employer's recognition of the union that represented the predecessor's employees, involved a petition or charge filed within weeks or a month or so after the successor employer granted recognition. In only two of the cases did a Region have to reach a substantive issue regarding what period constituted a reasonable period of bargaining.

In *Rural Metro*, Case 32-RC-71713, the Region preliminarily determined that the successor bar period had expired because the petition was filed more than six months after the successor employer had initiated bargaining with the incumbent union. In that case, the Region noted that the Employer was a perfectly clear successor, a factor that contributed to the Region's determination that the successor bar period should not be extended beyond six months. After the parties were notified of the Region's administrative assessment in this case, the parties entered into a stipulated election agreement.

Temple-Inland, Case 13-RD-66012, did not literally involve a successor bar issue. Rather, the case involved the Employer's relocation of its operations and its recognition of the Union that had represented the unit employees at the previous facility after the Employer hired a representative complement of employees at the new location. After analyzing the facts of this case, the Region determined that successor bar principles should be applied. The Region further found that under the circumstances, the successor bar period should not be extended beyond the six-month minimum period adopted by the Board in *UGI-UNICCO*. In accordance with that determination, the Region directed that an election be conducted. The Union did not file a request for review.

III OTHER MATTERS

A. NLRB Notice Posting

In anticipation of the April 30, 2012 effective date for the final rule on the notice of employee rights under the NLRA, the Committee is interested in the following issues:

1. **Will guidance be provided to the Regions concerning their authority to close a case based on a determination that the employer's failure to post was inadvertent?**
2. **Will guidance be provided to the Regions concerning an employer's counter posting?**
3. **In what circumstances will a complaint be issued? Will these cases be submitted to Advice?**
4. **Will guidance be provided to the Regions concerning the tolling of the Section 10(b) period based on an employer's failure to post the notice? Will guidance be provided concerning the investigation of the tolling issue?**
5. **Will guidance be provided to the Regions concerning the electronic posting of the Notice?**

In light of conflicting decisions at the district court level, the DC Circuit Court of Appeals has temporarily enjoined the NLRB's rule requiring the posting of employee rights, which had been scheduled to take effect on April 30, 2012.

In view of the DC Circuit's order, and in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the rule pending the resolution of the issues before the court.

In March, the D.C. District Court found that the agency had the authority to issue the rule. The NLRB supports that decision, but plans to appeal a separate part that raised questions about enforcement mechanisms. The agency disagrees with and will appeal the April 13, 2012 decision by the South Carolina District Court, which found the NLRB lacked authority to promulgate the rule.

Should the Board prevail, guidance will be provided to the Regions with regard to each of the issues identified here. Regions will also be instructed to submit to Advice any case that presents issues not clearly resolved by such guidance.

III.C. Regional Director Vacancies and Footprints

1. **The committee is interested in an update on Regional Director vacancies and recent appointments.**

2. **The committee is interested in an update on organizational changes in the Regions, particularly any contemplated mergers or boundary changes.**

As you know we have appointed seven Regional Directors in the last several months. All of them are in place. They are:

Region 2 – Karen Fernbach
Region 7 – Terry Morgan
Region 10 – Chip Harrell
Region 13- Peter Ohr
Region 19- Ron Hooks
Region 21 – Olivia Garcia
Region 29 – Jim Paulsen

Currently, the RD positions in Regions 11, 12, 14, 26 and 31 are unfilled. However, we posted for Regional Director positions in Regions 12 and 31.

Beginning in May 2012 we are piloting the consolidation of: Regions 10 and 11, Regions 14 and 17, and Region 25 and the Peoria Subregional Office.

The concept behind the pilot is to learn from these consolidations before we present the Board with a formal consolidation formula and proposal. We want to learn from these pilots answers to some of the many challenges that will confront the Directors in these new configurations including: management structure, process for deciding cases, complaint authority, consolidating functions such as compliance, settlement efforts, and NxGen reporting. Once we have some experience under our belt we will be in a better position to develop a national footprint plan and to provide tools and resources to regions who will be implementing such consolidations in the future.

The goal of the restructuring project is to equalize the regions in terms of case handling and staffing. Right now the range of responsibilities from one region to the other varies substantially. After studying the situation, we have preliminarily determined that the minimum number of cases a Region should manage would be 700 and the maximum 1350. That is not to say that there won't be some variances from that range. Candidly, we believe 700 is a bit low for a case floor and we think the optimum size hovers around 900-1000 cases. But obviously we have to look at geography, staffing, intake, travel and input from our employees and stakeholders in making these difficult decisions.

III.D. Budget

What will be the impact of anticipated changes in the Agency's budget over the next fiscal year on both the Board and General Counsel sides of the Agency? What impact, if any, will these changes have on case processing and enforcement? Will there be any reduction or reallocation of personnel and, if so, where?

There are no anticipated changes in case processing and enforcement. Staffing will remain consistent with case intake.

III.E. State Litigation

The Committee is interested in an update on the Acting General Counsel's pending litigation against the State of Arizona alleging unlawful intrusion into the Board's statutory jurisdiction.

On November 2, 2010, the voters of Arizona approved Article 2 § 37, entitled "Right to secret ballot; employee representation." Article 2 § 37 states "[t]he right to vote by secret ballot for employee representation is fundamental and shall be guaranteed where local, state or federal law permits or requires elections, designations or authorizations for employee representation."

On May 6, 2011, the NLRB initiated litigation against the State of Arizona seeking a declaratory judgment that Article 2 § 37 is preempted by operation of the NLRA and the Supremacy Clause insofar as it applies to private sector employees, employers and/or labor organizations. The Board's complaint asserted, alternatively, that the Arizona amendment is preempted (i) because, contrary to the State's interpretation, the Amendment's plain language—guaranteeing secret ballot elections whenever such elections are permitted under federal law—conflicts with federal law by "requir[ing] elections where federal law does not," and (ii) because even if, as the State asserted, the amendment merely supports the NLRA guarantee of a secret ballot election, the amendment is preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), since it creates a parallel state enforcement mechanism for protecting employee representation rights that Congress assigned the NLRB to protect.

The State filed a motion to dismiss arguing, among other things, that the lawsuit was premature because no state cases have been brought under the Amendment. Save Our Secret Ballot, the organization that has pushed to place this and other similar amendments on the ballots of various states, was permitted to intervene on a limited basis.

On October 13, 2011, the district court denied Arizona's motion to dismiss. The Court rejected the State's arguments that the Court lacks jurisdiction, that the Board has failed to establish any injury, and that the dispute is not ripe. In so ruling, the Court relied exclusively on the Board's *Garmon* preemption allegation and refrained from taking a position on the dispute between the Board and the State over whether the amendment conflicted with the rights afforded employees by the NLRA.

Thereafter, with the consent of Arizona and the intervenor, the Board amended the complaint to eliminate the conflict preemption claim and to proceed only under the *Garmon* parallel enforcement preemption claim. On January 13, the Court issued a scheduling order providing for a short period of discovery (over the Board's objection that the issues were purely legal); summary judgment pleadings are due May 14, responses June 13 and replies July 3.

III.F. NLRB Website/Public Relations

The Committee would like to know if the Agency is contemplating making any further changes in the website. In addition, members are interested if there are criteria for deciding what is appropriate for publication in Agency press releases and social media.

The Agency's new public website was launched in January 2011, and since then, the number of visitors and time spent on the site have increased substantially. The intention is to continually upgrade and enhance the site based on feedback from users. We have identified four areas for improvement in the short term.

First, we are working to improve the site's search function, based in part on feedback received from a focus group of P&P members. We have made some immediate improvements, such as adding more information to search results, and are about to develop and test a new interface that will make the search function more intuitive and easier to use.

Second, we plan to add more information and documents to our new Case Pages (each NLRB case now has its own web page). We have posted FY 2010 reports and anticipate posting FY 2011 reports by July 31. We are working on making our website more interactive so that the public can query information. Thereafter, the Agency expects to post annual snapshots of case processing data by November 1st for the prior fiscal year.

Third, we plan to redesign the Regional Office pages to provide more information on case developments in each region.

Fourth, we are adding a webpage dedicated to Protected Concerted Activity matters.

Regarding press releases, the Agency's policy is that Regions are instructed to notify the Office of Public Affairs of significant developments in their regions. The Office of Public Affairs generally issues a press release on any development flagged by a region as significant. In addition, press releases are issued on notable Board decisions and initiatives of the Acting General Counsel, and in cases that have drawn substantial media interest.